Supreme Court, U. S.
FILED
FEB 6 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1020

HELEN F. ROESCH,
Petitioner,

vs.

WILLIAM R. ROESCH,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE H. STOTTER
Attorney at Law
465 California Street, Suite 400
San Francisco, California 94104
Telephone: (415) 434-0600
Attorney for Petitioner

Of Counsel:
VICTORIA J. DE GOFF
Attorney at Law
1916 Los Angeles Avenue
Berkeley, California 94707
Telephone: (415) 524-1840

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7883

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This reply brief is submitted in further support of Helen F. Roesch's Petition for Writ of Certiorari and in response to "Brief of Respondent Opposing Petition for a Writ of Certiorari" served on January 24, 1979. The very arguments urged by respondent in opposition to the granting of a writ of certiorari underscore the importance of the issue presented for review, the error of the decision of the California Court of Appeal of which review is sought, and the propriety of and need for review by this court.

I.

RESPONDENT HAS NOT REFUTED THAT THIS CASE IS IMPORTANT.

In support of respondent's contention that this is not an appropriate case for exercising Supreme Court jurisdiction, respondent makes two arguments both of which are totally devoid of merit.

A. Respondent Does Not Even Discuss The Federal Question Presented.

Respondent first simply asserts that there is no significant federal question. (Brief in Opposition, page 6.) In support of this assertion, respondent either misreads or intentionally mischaracterizes the Court of Appeal decision as possibly an exercise of comity or an interpretation of statute. However, the decision is based on the federal Constitution and this is apparent from the opinion (see especially Appendix A to Petition, pages A-12 to A-14). In particular, the Court of Appeal stated:

> Thus, in *Addison v. Addison, supra,* 62 Cal.2d 558, the court held that a 1961 enactment expanding the definition of community property could constitutionally be applied in cases meeting two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouses sought in a California court legal alteration of their marital status. Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment.
>
> In the present case the parties lived in Pennsylvania for virtually their entire married life. *After* their separation, husband transferred his domicile to California; wife and the parties' minor son remained in Pennsylvania. Under these facts, the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial. Moreover, as a domiciliary of Pennsylvania, wife is entitled to the protection of the laws of that state. Application of California's quasi-community property statute was therefore improper. (Footnote omitted.)

The statement that "the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial" is the application to this case of the court's earlier holding that unless both parties have changed their domicile to California and subsequently sought legal alteration of their marital status in a California court, the interest of California in the property is insufficient to justify reclassification without violating the due process clause and the two privileges and immunities clauses.

To the extent that respondent acknowledges that the Court of Appeal decision was indeed based on the Constitution, he makes no argument supported by any reasons as to why this case might be insignificant or unimportant. Instead, he simply states its insignificance as his conclusion. He has ignored all of petitioner's arguments including the substantial bearing of this case on the ability of all

eight community property states to regulate marital property in accordance with their public policy. (Petition, pages 16-17.) This aspect alone makes the federal constitutional question in this case significant.

B. As The Federal Question Was Decided By The Court Of Appeal, It Is Conclusively Presumed To Have Been Properly Raised.

Respondent's second argument is that petitioner failed to raise the federal question properly below. (Brief in Opposition, pages 6-7.) This, too, is incorrect. The trial court decided the federal constitutional question in petitioner's favor. Respondent admits that he did not appeal from this portion of the judgment. Petitioner, of course, did not raise the constitutional question on appeal as it had been decided in her favor by the trial court and respondent had not appealed from the trial court's determination. Indeed, it was petitioner's contention that respondent's argument on the federal question made to the Court of Appeal was outside the legitimate scope of the appeal and that respondent was bound by the unappealed trial court's decision in petitioner's favor on the constitutional issue.

Petitioner was therefore rightfully surprised that the Court of Appeal decision was based on the Constitution. Nonetheless, it was the basis of the Court of Appeal opinion. Therefore whether or not petitioner argued it below becomes irrelevant. Where the lower court reaches the federal question it is sufficient under Supreme Court practice. *Jenkins v. Georgia* 418 U.S. 153, 157 (1974); see also, *OCALA Star-Banner Co. v. Damron* 401 U.S. 295, 299, note 3 (1971); *Ward v. Village of Monroeville* 409 U.S. 57,

61. There can be no question as to the proper presentation of a federal claim when the state court passes on it. An irrebuttable presumption is created that the federal question was timely and properly raised. *Raley v. Ohio* 360 U.S. 423, 436 (1959); see also, *W H Y Y, Inc. v. Borough of Glassboro* 393 U.S. 117, 119 (1968).

II.

RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE CASE WAS CORRECTLY DECIDED BY THE COURT OF APPEAL.

The majority of respondent's brief in opposition is devoted to the merits of this case. (Pages 7 to 16.) Petitioner, of course, has not submitted a full brief on the merits as it would be inappropriate to do so in a Petition of Writ of Certiorari. It is precisely in order that the merits be briefed that petitioner requests this court to grant the writ. However, petitioner will briefly answer respondent's arguments below.

A. Respondent Is In Error As To The Meaning Of The Addison Decision.

Respondent devotes approximately six pages to the California Supreme Court decision in *Addison v. Addison* 62 Cal.2d 558, 43 Cal.Rptr. 97, 399 P.2d 897 (1965). (Brief in Opposition pages 8 to 14.) As discussed in the Petition, the *Addison* decision and the development of the constitutional issue in this case in California state courts prior to the present decision supports petitioner herein. (Petition, pages 11 to 14.) However, since respondent has dealt with *Addison* totally out of its California context, petitioner has attached hereto as Appendix A and incorporates herein

by this reference, a section of her petition for rehearing filed in the Court of Appeal which briefly explains the development of this body of constitutional law in California which was set back almost 50 years by the Court of Appeal's decision herein.

B. Respondent Admits That Petitioner's Interpretation Of The Constitution Is Correct And That This Case Presents An Important Constitutional Question.

Respondent's discussion of the Fourteenth Amendment due process clause (Brief in Opposition, pages 14-15) could have been written by petitioner. Respondent acknowledges that a balancing test is applicable to determine whether the state's inherent police power has been properly used by the legislature to protect the safety, moral health and general well being of the people. Respondent, however, seems to forget that it is California legislation which petitioner seeks to have applied. It can be struck down only if it is unconstitutional and not merely because other states such as Pennsylvania view community property or quasi-community property concepts as outrageous.[1]

Respondent's Fourteenth Amendment privileges and immunities discussion (Brief in Opposition, page 15) raises an additional important federal question, namely, whether

[1]Subsequent events further demonstrate the irreconcilable differences between the totality of California and Pennsylvania law rendering piecemeal application as here unjustifiable. (See Petition, pages 6-8, 11, 13-14.) Pennsylvania does not permit alimony or spousal support to be awarded to a wife after a final divorce. As a result, Pennsylvania also refuses to give full faith and credit to other States' decrees for support after divorce. *Commonwealth ex. rel. Platt v. Platt* 333 A.2d 29, 30-31 (Penn. Sup. Ct. 1974); *Watson v. Watson* 364 A.2d 431, 433 (Penn. Sup. Ct. 1976). Petitioner is therefore confronted with unique and severe enforcement problems.

the California legislation is perhaps unconstitutional because it interferes with the constitutional right to travel.

Respondent's Article IV, section 2, privileges and immunities argument is a total non-sequitur. Petitioner has requested this court to decide the constitutional issue and then to remand this case to the Court of Appeal to apply California law to the property issues on the merits. (See Petition, pages 10 and 11, fns. 4 and 5.)

C. Petitioner Was Substantially Damaged.

Respondent contends that petitioner was not damaged because she was awarded more than a Pennsylvania court would give her. (Brief in Opposition, pages 4-5 and 16-17.) Respondent's references in his Statement of the Case to prior actions filed and abandoned by petitioner in Pennsylvania have nothing to do with the legal issues in this case.

As explained in the petition, it was and is petitioner's contention that she was entitled to approximately a million dollars more in property than the trial court awarded her. (Petition, pages 10 and 11, fns. 4 and 5.) It was because of the Court of Appeal's erroneous application of the Constitution that it did not consider petitioner's claims of error regarding application of California law on the property division. Respondent further misses the point that a Pennsylvania court would have protected petitioner by refusing to allow respondent to terminate the marriage.

III.

THE ERRONEOUS CHARACTERIZATION OF THIS CASE BY RESPONDENT FURTHER DEMONSTRATES THE NECESSITY FOR FULL AND COMPLETE BRIEFING AFTER THE GRANTING OF THE WRIT.

Respondent's Brief in Opposition throughout also contains arguments and factual points which are either irrelevant or misleading. It attributes to petitioner certain arguments not advanced by her petition and mischaracterizes the record and the result of the Court of Appeal. Petitioner has demonstrated above that respondent has failed to refute the importance of this case and has failed to demonstrate that it was decided correctly or that she was not damaged. In this section, petitioner will now briefly correct the most egregious of respondent's other errors and inaccuracies.

1. The supplemental brief which the Court of Appeal denied petitioner leave to file did not contain constitutional arguments, but involved property issues, the majority of which were not considered by the Court of Appeal because of its erroneous decision on the federal question. (Brief in Opposition, pp. 2-3.) Petitioner sought leave to file this brief after the Court of Appeal had granted a rehearing and while the matter was pending. It then rendered a second opinion which was virtually the same as the first opinion, both of which decided the constitutional issue against petitioner. Apparently the Court of Appeal felt no need to permit a filing of a supplemental brief on the merits of the state issues as it had no intention of reaching them given its constitutional holding.

2. Respondent's move to California was neither necessary nor a "chance transfer". (Brief in Opposition, pages 4 and 12-13.) He was President and Chairman of the Board of Jones & Laughlin Steel Corporation in Pennsylvania. He made a deliberate decision to leave this employment and carefully negotiated a lucrative contract to become Chairman of the Board and Chief Executive Officer of Kaiser Industries in California, earning more than $400,000 a year, with a provision for income of $75,000 a year for ten years after termination of his employment at Kaiser for any reason including cause. Respondent did not come to California as the result of a simple in-house transfer of a low level employee, but by his own decision—that of a man who could write his own ticket. Indeed, though not reflected in the record, respondent has now returned to Pennsylvania with his new wife, having obtained a no fault dissolution of his marriage under California law.

3. Contrary to respondent's assertions (Brief in Opposition, pages 4, 5 and 8 fn. 5), the adoption of petitioner's position would not allow a spouse to move to a community property state and thereby automatically convert the other spouse's separate property into quasi-community property. Indeed, this court's decisions in *Estin v. Estin* 334 U.S. 541 (1948) and *Vanderbilt v. Vanderbilt* 354 U.S. 416 (1957) establishing "divisible divorce" prohibit such a result. In order to prevent the result suggested by respondent, the spouse who does not move need only refuse to appear in the new domicile and that court cannot divide the property.

In the present case, as in many similar fact situations throughout the country, the acquiring spouse is the party who moves, seeks to terminate the marriage and who should

be required to share his property with the other non-acquiring spouse he left behind. Where the acquiring spouse, as here, seeks the aid and protection of California law, it should be applied if the non-acquiring spouse, as here, voluntarily appears in the action. Indeed, under respondent's interpretation of the Constitution, quasi-community property law could be applied if petitioner had only moved to California instead of just making a general appearance in California. It is petitioner's further contention that to refuse to apply California law to her because she is not a domiciliary could itself be unconstitutional.

4. Even if the *Addison* decision were limited to its facts, petitioner fits within these facts for the following reasons: The grounds for dissolution of marriage in California are irreconcilable differences. Respondent contends that petitioner's failure to come to California is the basis on which he sought a dissolution. This necessarily occurred after respondent came to California. Thus, the grounds which gave rise to dissolution occurred after respondent had moved to California.

Insofar as domicile is important to the determination of the constitutional question, it is important only in order to insure that California does not overreach by applying its law to a party with whom it has insufficient contact. In the present case, respondent, the party who seeks to avoid application of California law, himself was the party who sought the application of California law and the jurisdiction of its courts to dissolve his marriage. It would thus only be the nondomiciliary petitioner whose rights might need to be protected by a refusal to apply California law. However, petitioner voluntarily agreed to appear in

California and that its law be applied. Respondent, the resident and domiciliary of California, should not be heard to complain of the application of California law.

5. The facts in this case are not "unusual". (Brief in Opposition, page 7.) It is precisely on the facts of this case that the constitutional issue is commonly presented in our mobile society. The spouse acquiring property in one state left the state of the marital domicile and dissolved his marriage in a community property state. The community property state provides that on dissolution, the marital property is to be divided equally or equitably between the parties. Whether this strong public policy of the community property state may be constitutionally applied is the very issue in this case.

CONCLUSION

For the foregoing additional reasons, petitioner respectfully requests that a writ of certiorari issue to the Court of Appeal of the State of California.

Respectfully submitted,

February 5, 1979

LAWRENCE H. STOTTER
Attorney for Petitioner

Of Counsel
VICTORIA J. DE GOFF

[Appendix Follows]

APPENDIX

APPENDIX A

THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE APPLICATION OF CIVIL CODE SECTION 4803 IN THE PRESENT CASE.

In *Estate of Thornton* (1934) 1 Cal.2d 1, the Supreme Court held unconstitutional the Legislature's attempt to turn property which spouses domiciled in California had acquired while living in a common law jurisdiction, into community property when they crossed the border into California. The *Thornton* court based its decision on the then California constitutional doctrine that any changes in community property law that decreased the husband's right of dominion over the property disturbed his vested rights and therefore could only apply to subsequent acquisitions. (*Id.*, at p. 3; *Spreckels v. Spreckels* (1897) 116 Cal. 339). The *Thornton* court stated:

> "So long as we are bound by the holding that to limit the right of one spouse by increasing the right of the other in property acquired by their united labors, is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the Fourteenth Amendment of the Constitution of the United States. If the right of the husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen. Again, to take the property of "A" and transfer it to "B" because of his citizenship and domicile, is also to take his property without due process of law. This is true regardless of the place of acquisition or the state of his residence." (1 Cal.2d at p. 5).

Professor Barbara Armstrong, the leading California commentator on community property law, said of this decision:

> "In brief, the court felt bound by the often repeated holding that the control of rights in both community and separate property of spouses who acquired property while domiciled here, remain untouched by subsequent statutory changes in such controls. The court felt, therefore, that it could not thwart legislation that reached a contrary conclusion as to property brought into this state after being accumulated in a common law state." ("'Prospective' Application of Changes to Community Control—Rule of Property or Constitutional Necessity?," Barbara N. Armstrong (1945) 33 Cal.L.Rev. 476, 503).

In commenting on the *Thornton* decision Herma Hill Kay (then Herma Hill Schreter) recognized that it depended upon *Spreckels* and urged that "these two impediments to the reform of community property law in California may be ended simultaneously in a proper case." (Herma Hill Schreter, "Quasi-Community Property' in the Conflict of Laws" (1962) 50 Cal.L.Rev. 206, 210-226, 225-226).

Twelve years later the Supreme Court, on the same rationale, decided that because the rents, issues and profits and property retained the same character as the property itself, the husband's power over them could not be diminished retroactively either. (*Boyd v. Oser* (1944) 23 Cal.2d 613). However, in this decision were planted the seeds of change. In his concurring opinion Justice Traynor stated that in his opinion the constitutional theory that statutes changing the rights of husbands and wives in community property could have no retroactive application was unsound. (23 Cal.2d at pp. 623-624). This concurring opinion was lauded by Professor Armstrong who wrote:

> "The previous law review comment in 27 Cal.L.Rev. 49, cited in Justice Traynor's concurring opinion, persuasively argues the unsoundness of this constitutional doctrine. The amplification of argument, which this article involves, has seemed useful because of its great importance and also, as this is a memorial issue of the Review, because of Dean McMurray's strong conviction of its importance." (Armstrong, *Op.Cit., supra,* 33 Cal. L.Rev. at p. 376, fn. 1).

She continued by urging that "an early adoption by the Supreme Court of the special concurring opinion rendered in *Boyd v. Oser* would seem both logical and desirable." (33 Cal.L.Rev. at p. 405). Her theory was that so-called "vested rights" could constitutionally be impaired by a change in the law which was sufficiently necessary to preserve the public welfare. (33 Cal.L.Rev. at pp. 395-396).

Subsequently, the Supreme Court in *Addison v. Addison* accepted the reasoning of then Chief Justice Traynor's concurring opinion in *Boyd v. Oser* and the theory urged by Professor Armstrong. (*Addison v. Addison* (1965) 62 Cal.2d 558). In upholding the constitutionality of Civil Code section 4803, the *Addison* court also repudiated the *Thornton* decision as follows:

> "The constitutional doctrine announced in *Estate of Thornton, supra,* has been questioned. Justice (now Chief Justice) Traynor, in his concurring opinion in *Boyd v. Oser,* 23 Cal.2d 613, had the following to say, at p. 623:
>
> > 'The decision that existing statutes changing the rights of husbands and wives in community property

> can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. [Citations.] That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively.'
>
> "The underlying theory of *Thornton* has also been questioned by several legal authorities in this field. (Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity? (1945) 33 Cal.L.Rev. 476; Schreter, "Quasi-Community Property" in the Conflict of Laws (1962) 50 Cal.L.Rev. 206; Comment, Community and Separate Property; Constitutionality of Legislation Decreasing Husband's Power of Control over Property Already Acquired (1938) 27 Cal.L.Rev. 49, 51-55; see also Comment (1927) 15 Cal.L.Rev. 399.)"
>
> "Thus, the correctness of the rule of *Thornton* is open to challenge." (62 Cal.2d at pp. 565-566).

The *Addison* Court, however, was not required specifically to overrule *Thornton* because it was not controlling in *Addison*. (62 Cal.2d at p. 566). *Addison* was heralded as "a milestone in California Supreme Court history. It makes the first hole in the wall of rigid doctrine which stood unscarred since 1897 and which blocked the way of orderly progress toward equitable property arrangements for California spouses." (Brigitte M. Bodenheimer, "Justice Peters' Contribution to Family and Community Property Law " (1969) 57 Cal.L.Rev. 577, 577).

The next major step in the abolition of the antiquated, inappropriate and unfair doctrines lingering from *Spreckels* and *Thornton* was taken two years ago by the California Supreme Court in *In re the Marriage of Bouquet* (1976) 16 Cal.3d 583. At issue in *Bouquet* was a 1971 amendment to Civil Code section 5118 which made the earnings and accumulations of both spouses while living apart their respective separate property. Under prior law, only those of the wife were separate property while the husband's remained community property. The trial court had held that only earnings and accumulations acquired after the March 4, 1972, effective date of the amendment could constitutionally be the husband's separate property. The Supreme Court reversed. It found that the Legislature had intended the statute to operate retroactively and it held that retroactive application was not unconstitutional.

The *Bouquet* Court acknowledged and recognized that the husband's earnings acquired prior to the effective date of the statute would clearly have originally been classified as community property in which the wife had gained substantial rights. The court also acknowledged and recognized that the retroactive application of this change in the law would deprive the wife of her vested right to her half share of the income her husband had accumulated in that period. Notwithstanding these facts, the court upheld retroactive application of the amendment. (16 Cal.3d at pp. 591-592). It did so by expanding the reasoning of the *Addison* opinion and Professor Armstrong's Law Review article. (16 Cal.3d at pp. 593-594).

With *Bouquet*, the Supreme Court has finally made clear once and for all that legislative enactments governing marital property are not to be frustrated by the application of outdated constitutional doctrine. (16 Cal.3d at pp. 593-594, esp. fn. 10). In the present case, therefore, the court was in error in not simply applying Civil Code section 4803 in accordance with its clear language which dictates a finding that all of the parties' marital assets were quasi-community property. In light of the foregoing, this court was therefore incorrect in having relied on *Thornton* in any way and in having limited Addison to its facts.